

The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOFI FEDERAL BANK, a federally chartered
banking institution,

Plaintiff,

V.

ADVANCE FUNDING LLC; KIRK A. TOVEY, individually and as trustee of the KIRK A. TOVEY REVOCABLE TRUST; and SETTLEMENT COLLECTION SERVICE, LLC.

Defendants.

NO. 2:14-cv-00484-BJR

**PLAINTIFF BOFI FEDERAL
BANK'S SURREPLY IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

1 Pursuant to Local Civil Rule 7(g), Plaintiff BofI Federal Bank (“BoFI”) files this
 2 surreply to request that the Court strike portions of Defendants’ Reply in Support of Motion for
 3 Summary Judgment of Dismissal (“Reply,” Dkt. 116).

4 In Defendants’ Motion for Summary Judgment of Dismissal (“Motion,” Dkt. 110),
 5 Defendants Settlement Collection Service, LLC (“SCS”) and Kirk A. Tovey, individually and
 6 as trustee of the Kirk A. Tovey Revocable Trust (“Tovey”), expressly stated that they were
 7 moving for summary judgment on only two elements of BoFI’s tortious-interference claim.
 8 They argued that BoFI “has not and cannot establish that the Defendants had prior knowledge
 9 of the BOFI Agreement or that they induced Ms. Venzant to cancel the arrangement.” (Motion
 10 10:18-20.) They stated in footnote 1: “Although, for purposes of the Motion, *only two*
 11 *elements of the cause of action are discussed*, Defendants are not waiving and specifically
 12 reserve the right to challenge each and every element of the claim.” (*Id.* at 10:25-26, emphasis
 13 added.) Because SCS and Tovey discussed only two elements of BoFI’s tortious-interference
 14 claim, BoFI only discussed those two elements of the claim in its Opposition to Defendants’
 15 Motion for Summary Judgment of Dismissal (“Opposition”). (Dkt. 114, at 11:3 – 15:11.)

16 In their Reply, SCS and Tovey for the first time challenge the first element of BoFI’s
 17 tortious-interference claim. (Reply 3:7 – 5:15.) They contend that because BoFI argued in its
 18 Opposition that Ms. Venzant “was aware of and consented to the two-year postponement for
 19 payment,” BoFI “reveal[ed] that apparently it never had an enforceable agreement. (*Id.* at 3:8-
 20 11.) Not only is this argument incorrect (SCS and Tovey cite no authority for the proposition
 21 that amendment of the BoFI Agreement [including the Life Contingent Payment Addendum]
 22 was necessary or that the BoFI Agreement was unenforceable absent such amendment), BoFI
 23 has maintained throughout this litigation that Ms. Venzant knew about and agreed to the two-
 24 year extension. (*See, e.g.*, Dkt. 38 at 5:6-8.) It was therefore improper for SCS and Tovey to
 25 address this issue for the first time in their Reply.

1 BofI accordingly requests that the Court strike Section A of SCS and Tovey's Reply (at
2 3:7 – 5:15).¹

3 DATED: October 16, 2018

4 **SAVITT BRUCE & WILLEY LLP**

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11 Attorneys for Plaintiff BofI Federal Bank
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25 ¹ To the extent SCS and Tovey are suggesting in their Reply that the BofI Agreement was unenforceable
26 because Ms. Venzant purportedly cancelled it (Reply 6:3-22, 8:2-3, 10:20-26), that argument would also
be improper in a reply brief and the Court should strike it – especially since at most, Ms. Venzant's
27 purported cancellation notice would only have constituted an anticipatory breach or repudiation of the
BofI Agreement. *See CKP, Inc. v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63, 74 (1991).

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date indicated below, I electronically filed the foregoing
3 document with the Clerk of the Court using the CM/ECF system which will send notification of
4 such filing to all counsel of record.

5 DATED this 16th day of October, 2018 at Seattle, Washington.

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8 Rondi A. Greer